BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF HAWAI`I

In the Matter of	)	DOCKET NO. 2008-0273
	)	
PUBLIC UTILITIES COMMISSION	)	
	)	
Instituting Proceedings to Investigate the Implementation Of Feed-in Tariffs.	)	
	)	

CITY AND COUNTY OF HONOLULU'S RESPONSES TO THRESHOLD LEGAL QUESTIONS 1-3 SET FORTH IN APPENDIX C TO THE NATIONAL REGULATORY RESEARCH INSTITUTE'S SCOPING PAPER

AND

CERTIFICATE OF SERVICE

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The CITY AND COUNTY OF HONOLULU ("City"), by and through its attorneys, Corporation Counsel, Carrie K. S. Okinaga, and Deputy Corporation Counsel, Gordon D. Nelson, submits to the Commission its responses to the threshold legal issues identified in Appendix C to the Commission's "Scoping Paper" entitled, "Feed-in Tariffs: Best Design Focusing Hawaii's Investigation", prepared by its consultant, National Regulatory Research Institute, and served on the parties herein:

1. If the price associated with a feed-in tariff exceeds the utility's avoided cost, then by definition the utility's customers will incur higher costs than they would in the absence of the feed-in tariff. Please comment on the legal implications of this result. For example:

a) Is this result permissible under current Hawaii statutes?

Assuming that "this result" refers to wholesale tariff prices in excess of avoided costs, the answer appears to be "no".

b) Does HRS § 269 27.2 create a ceiling on the feed-in tariff price?

Yes. HRS 269-27.2 (c) provides:

> In the exercise of its authority to determine the just and reasonable rate for the nonfossil fuel generated electricity supplied to the public utility by the producer, the commission shall establish that the rate for purchase of electricity by a public utility shall not be more than one hundred per cent of the cost avoided by the utility when the utility purchases the electrical energy rather than producing the electrical energy.

This provision seems clearly to create a ceiling on the feed-in tariff price.

c) If so, how do the signatories to the Energy Agreement (or other parties to this proceeding) propose to demonstrate that each feed in tariff price does not violate the statute?

In view of the City, HRS 269-27.2 (c) must be amended in order to accommodate a feed in tariff price that exceeds avoided cost.

Short of amending the statute to permit a price that exceeds avoided cost, it has been suggested that as a way of encouraging development of renewable energy, components not currently included in the calculation of avoided cost, "adders", if you will, could be considered for inclusion. The City concurs that, as with PURPA, all components that represent real costs that would be otherwise incurred by the utility should be accounted for in the calculation of avoided cost under HRS 269-27.2 (c).

2. As with any administrative agency decision, a Commission decision approving a feed in tariff must be supported with substantial evidence.

a) Focusing on the price term, what evidence is legally necessary? Consider these options, among others:

i) evidence of actual costs to develop similar projects in Hawaii

Ultimately, each tariff price should be established by preponderant evidence of the level of profitability required by an "average" potential generator in order to induce it to develop the targeted renewable technology. Evidence of actual costs to develop similar projects in Hawaii seemingly represents the best evidence and should perhaps carry more weight, but may not always be available. It should not be the only acceptable evidence. Testimony regarding estimated development costs may also be persuasive.

ii) generic (i.e., non Hawaii) evidence of costs associated with each particular technology

"Generic" evidence that is relevant and material may assist the Commission in developing the record and could suffice to establish the price for a particular targeted technology where evidence of similar projects in Hawaii is unavailable. Even where evidence of similar projects in Hawaii is available, relevant and material "generic" evidence should be accepted and accorded appropriate weight.

iii) evidence that the tariff price results in costs equal to or below the utility's avoided cost

This type of evidence would seem to be legally necessary as long as HRS 269-27.2 (c) remains un-amended and continues to operate as a ceiling.

b) By what process do the signatories (and other parties to this proceeding) propose to gather this evidence and present it the Commission, under the procedural schedule proposed by the signatories?

The City agrees that under any of the various aggressive schedules proposed for or in this docket, all involved will be challenged in gathering and presenting evidence to the Commission.

3. Assume the Commission does create feed in tariffs, which entitle the seller to sell to the utility at the tariff price.

a) If the tariff price exceeds the utility's avoided cost, is there a violation of PURPA, provided the seller is relying on a state law right to sell rather than a PURPA right to sell?

A seller's reliance "on a state law right to sell" at above avoided cost implies an obligation imposed by state law upon utilities to purchase at above avoided cost.

However, under PURPA a state apparently cannot require a utility to purchase power from a QF at a rate in excess of the least avoided cost. *Southern California Edison Company*, 70 FERC ¶61,215, at p. 61,675 (February 23, 1995) ("Edison"), citing *American Paper Institute, Inc. v. American Electric Power Service Corp., et al.*, 461 U.S. 402, 413 (1983). That case involved of the Biennial Resource Plan Update (BRPU) of the California Public Utilities Commission. The BRPU structured a bidding process where only QFs bid against one another for new capacity, and it required renewable set-asides, forcing utilities to purchase a certain percentage of energy from renewable sources. FERC disallowed the plan, ruling that BRPU forced utilities to pay above avoided costs by excluding some potential generation sources from the bidding for the QF segment of the bid. As FERC has stated, "PURPA does not

permit either the [FERC] or the States in their implementation of PURPA, to require a purchase rate that exceeds avoided cost." Thus, while FERC

> has not, and does not intend in the future, to second-guess state regulatory authorities' actual determination of avoided costs (i.e., whether the per unit charges are no higher than incremental costs) . . . [FERC does ensure that] the *process* used to calculate the per unit charge (i.e. implementation) accords with the statute and [FERC's] regulations."

E*dison*, 70 FERC ¶ 61,215 at p. 61,677 (emphasis added). When the *methodology* for determining avoided cost is itself flawed because it authorizes payments exceeding avoided cost, FERC will invalidate the methodology.

Similarly, in *Connecticut Light and Power*, 70 FERC ¶ 61,012 (Jan. 11, 1995) FERC held that a utility could not be forced pursuant to state requirements to pay a QF more than avoided cost for any purchased power. The statute in that case (which required the utility to pay the same rate for purchasing power from a municipal resource recovery facility (a QF) that it charged the municipality for power) was preempted because it compelled a wholesale sale of energy for resale at more than the avoided cost. FERC stated, "We cannot ascertain . . . any legal basis under which states have independent authority to prescribe rates for QFs at wholesale that exceed the avoided cost cap contained in PURPA." 70 FERC ¶ 61,012, at p. 61,029.

The City does not claim expertise in these matters, but a review of the foregoing cases cited by Haiku Design and Analysis in its response suggests that serious questions exist regarding potential federal preemption, if the feed-in tariff were to mandate purchases from QFs at above avoided cost.

b) If the tariff price exceeds the utility's avoided cost (as calculated prior to the existence of the tariff), could a seller assert a PURPA right to a sale at the tariff price, on the grounds that the utility now has a new

"avoided cost" equal to cost it would have incurred under the state mandated feed-in tariff?

No. A tariff price that exceeds avoided cost is just that, a price in excess of avoided cost. It does not create a new and higher "avoided cost".

c) If the price associated with a feed in tariff is less than the utility's avoided cost, what benefit does the tariff offer the developer that is not already available under PURPA?

PURPA specifies that the rates paid for QF power must not exceed the utility's avoided cost. PURPA § 210(b) (codified at 16 U.S.C. § 824a-3(b) (2008)). Thus the Act itself only sets a ceiling. However, to encourage the development of QFs, FERC set PURPA rates for QFs at the maximum level allowed by the Act. FERC regulations state that a just, reasonable, and nondiscriminatory rate for QF power is the avoided costs, which are to be determined after consideration of factors set out in the regulations. 18 C.F.R. § 292.304(b)(2) (2008). Thus, as a practical matter under PURPA, avoided cost is also the floor price that utilities must pay for QF energy and capacity.

If the price associated with a feed-in tariff is <u>less</u> than the utility's avoided cost, i.e., less than this PURPA floor, the tariff would not seem to offer a QF any price benefits "not already available under PURPA". However, a developer that is not a QF might still find the price offered under the feed in tariff sufficiently attractive to encourage development. Further, Haiku Design and Analysis has suggested, and the City concedes, that there may be some potential benefits to developers from a feed in tariff apart from a guaranteed price of full avoided cost.

d) Please offer any other comments concerning the legal and practical relationship between the feed in tariff and existing PURPA rights and obligations.

In it has been suggested that PURPA prohibitions on QF prices above avoided cost might be avoided by characterizing purchases made under a feed-in tariff as voluntary rather than mandatory. It has also been correctly noted that "[n]othing in PURPA prevents state commissions from approving power purchase contracts at rates above avoided costs where the utility and independent power producer have agreed on pricing and other terms."

This idea should be explored further. It may be possible to design a feed-in tariff that spurs development of renewable energy by easing the voluntary contracting process without mandating purchases by the utilities.

However, the City notes that a mandatory purchase requirement appears to be a key aspect of successful feed in tariffs elsewhere. Further, it is difficult to conceptualize a tariff mechanism that will parlay the current willingness of the utilities to pay above avoided costs into something that will be "binding on future instances", and yet will still be viewed for PURPA purposes as not being mandatory.

DATED: Honolulu, Hawaii, January 12, 2009.

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CERTIFICATE OF SERVICE

The foregoing document was served on the date of filing by electronic transmission on the date of signature to each of the parties listed below.

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